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Supreme Court of the United States

October Term, 1975
No. 75-145

THE NORTHERN CHEYENNE TRIBE,
Petitioner,

v.

WILLIAM HOLLOWBREAST, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

At the outset, petitioner must voice the strongest possible objections to respondents' complete mischaracterizations of petitioner's identity and purpose in this action, and of the legal position advocated herein by petitioner.

a. Petitioner's Identity and Purpose

Respondents have variously described petitioner as "The Northern Cheyenne Tribe, Inc.",[1] a "fictitious artificial legal

1. Brief for Respondent Class of Northern Cheyenne Indians (hereinafter referred to as Brief For Tribal Respondents) at 3.

corporate entity",[2] an "extended arm of corporate creation, the Tribal Corporation",[3] the "tribal corporation",[4] and finally the "tribal council".[5] These prejudicially inaccurate characterizations, however, should not be permitted to obscure the fact that petitioner is in fact The Northern Cheyenne Tribe, a long-recognized American Indian tribe, governed by a representative system of government which is provided for in a tribally-ratified and federally-approved Constitution.[6] That representative government is embodied in the Northern Cheyenne tribal council, which, under the tribal Constitution, is democratically elected every two years by direct vote of the adult members of the Tribe.[7] Furthermore, if petitioner prevails herein, the mineral wealth of the Northern Cheyenne Reservation will remain subject to legislative strictures calculated to assure that it will inure to the benefit of all the Northern Cheyenne people:

> The coal or other minerals, including oil, gas and other natural deposits, on said reservation are hereby reserved in perpetuity for the benefit of the tribe and may be leased with the consent of the Indian council for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe.[8]

2. *Id.* at 24-25.

3. *Id.* at 23.

4. *Id.* at 4, 11, 18, 25, 35, 37, 38, 42.

5. Brief for Respondents Williamson and Bowen at 4, 5, 45, 47, 48, 49, 50, 54.

6. DEP'T OF THE INTERIOR, CONSTITUTION AND BY-LAWS OF THE NORTHERN CHEYENNE TRIBE OF THE TONGUE RIVER RESERVATION, art. III, §§1-2 (1957).

7. *Id.* art. VI.

8. Act of July 24, 1968, §1, 82 Stat. 424 (*See* Brief for Petitioner at A-6).

> [A]ll the income of said tribe from rents, royalties, or other profits accruing from the sale of any timber, coal, or other minerals, including oil, gas, and other natural deposits herein reserved for the benefit of the said Indians . . . shall be deposited in the Treasury of the United States to the credit of the Northern Cheyenne Indians and be subject to expenditure for their benefit in such manner as Congress may direct. . . .[9]

This action, brought reluctantly by the Northern Cheyenne Tribe solely because of Congressional mandate,[10] is, therefore, decidedly *not* an effort by a "tribal corporation" or "tribal council" to wrest from the people the benefits of mineral development. On the contrary, this action is brought to assure that the mineral wealth of the reservation will in fact remain with, and be enjoyed by, *all* Northern Cheyennes.

b. Petitioner's Legal Position

Respondents assert that it is petitioner's position that Congress' plenary power over Indian lands is "unbridled",[11] "unlimited",[12] and not subject to the Fifth Amendment,[13] such that Congress may "abrogate any vested rights".[14] This is a gross mischaracterization. Petitioner's position, stated in general terms, is as follows:

(1) the mere enactment of a statutory scheme contemplating allotment does not, in and of itself, vest rights to allotment protected by the Fifth Amendment;

(2) so long as this statutory scheme remains executory, Congress has inherent authority to alter it in light of chang-

9. Act of June 3, 1926, §4, 44 Stat. 691-92 (*See* Brief for Petitioner at A-3).

10. Act of July 24, 1968, §2, 82 Stat. 425 (*See* Brief for Petitioner at A-6).

11. Brief for Respondents Williamson and Bowen at 56, 58.

12. *Id.* at 59.

13. *Id.* at 82-83.

14. *Id.* at 61.

ing conditions, the welfare of the Indians, and the public interest;

(3) however, to the extent that the statutory allotment scheme is in fact carried into effect, rights protected by the Fifth Amendment are vested in the allottees.

Moreover, and more particularly, it is grossly inaccurate to state that it is petitioner's position that Congress has power "to terminate *any* property rights on the Northern Cheyenne Indian Reservation",[15] and that "all [those] property rights [are] dangling perpetually at the Congressional whim".[16] On the contrary, petitioner in fact contends *only* that insofar as the 1926 Northern Cheyenne allotment scheme remains executory, Congress retains authority to alter that scheme. Since in 1968 the statutory plan for allotment of tribal minerals was still executory, Congress had full power to change that plan.

1. *The Argument*[17] *That Respondents Acquired Vested Rights To the Minerals "When They Selected the Land and Submitted Their Application" Is Invalid.*

Respondents Williamson and Bowen argue that they acquired vested rights in the minerals beneath their allotments at some unspecified time between the enactment of the 1926 Act and June 18, 1934.[18] This argument is based on the asserted general principle that vested rights arise from the filing of an application for allotment. However, this conclusion is unsupported by the authorities—even those cited by respondents.

15. Brief for Respondents Williamson and Bowen at 37.
16. *Id.*
17. Brief for Respondents Williamson and Bowen at 30-32, 59-61, 68-70, 77-79.
18. Brief for Respondents Williamson and Bowen at 32.

Respondents rely heavily on *Sizemore v. Brady*, 235 U.S. 441 (1914). However, without question *Sizemore* does *not* propound, as respondents claim, a general rule that rights vest on application for allotment. Rather, the case simply affirms and applies the well-established proposition that Congress retains inherent continuing power to alter unconsummated statutory plans for allotment.

The key to the *Sizemore* analysis was this Court's observation that the involved allotment plan contemplated that certain interim events were to occur before individual property rights were to come into existence. So long as Congress altered its plan for the creation of those rights prior to the occurrence of those interim events, the alteration invaded no vested rights:

> [Congress' allotment plan] contemplated that *various preliminary acts* were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was *carried into effect* were individual claims to be fastened upon them. Unless and until *that* was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. [emphasis added][19]

Precisely analogous to the occurrence of the "various preliminary acts" contemplated in the *Sizemore* allotment plan is the expiration of the fifty-year period contemplated in the Northern Cheyenne allotment plan.[20]

Respondents Williamson and Bowen strain to character-

19. 235 U.S. at 449.
20. It is only upon the expiration of this fifty-year period that the minerals and natural deposits "*become* the property of the respective allottees or their heirs" in the Northern Cheyenne allotment plan. Act of June 3, 1926, 44 Stat. 690 (Brief for Petitioner at A-2) (emphasis added).

ize *Sizemore* as holding generally that the filing of an allotment application extinguishes Congress' power to alter executory aspects of the allotment plan. Plainly, there is no such holding in *Sizemore*. This Court simply held that heirs under Creek law acquired no vested rights to allotment, and that, therefore, Congress could supplant them with heirs under Arkansas law. There was no issue as to the nature of the resulting interest acquired by the heirs under Arkansas law. Accordingly, *Sizemore* neither held, nor indicated in dicta, that the Arkansas law heirs held vested rights to allotment.[21]

Respondents Williamson and Bowen also assert that this Court's 1921 decision, *Chase, Jr. v. United States*, 256 U.S. 1, holds that rights to allotment vest with the filing of an allotment application.[22] This assertion, however, is not only baseless, but flatly contradictory to the holding in that case. In fact, *Chase, Jr.* held that Congress may indeed cut off pending allotment applications through the exercise of its well-established continuing power to repeal allotment legislation.

The facts and procedural history in *Chase, Jr.* were as follows. Congress enacted allotment legislation for the

21. Respondents Williamson and Bowen attempt to extract such a holding by mischaracterizing the issue in *Sizemore* as: "Did Grayson's (or his estate's) right in the allotment vest prior to *or after* the amendment of the intestacy laws?" (emphasis added). Brief for Respondents Williamson and Bowen at 68 note 132. However, the *Sizemore* Court made no determination whatsoever of the nature of the rights "after" the amendment. This is, in fact, conceded by respondents Williamson and Bowen in their succeeding footnote. Brief for Respondents Williamson and Bowen at 69 note 133.

Subsequently, in *Woodward v. DeGraffenried*, 238 U.S. 284 (1915), which dealt with the allotment legislation involved *Sizemore*, this Court held that certain Creek law heirs had acquired vested rights. This holding, however, was based on a significantly different fact situation which is discussed at pages 23-24, *infra*.

22. Brief for Respondents Williamson and Bowen at 57 note 115.

Omaha Tribe in 1882 and 1893. Chase, Jr., a tribal member, submitted an application for an eighty-acre allotment. This application was denied by the Secretary of the Interior; hence, in 1910, Chase, Jr. brought suit. The trial court dismissed, but in 1916 the Eighth Circuit reversed—holding that Chase, Jr. was entitled to an allotment of forty of the eighty acres under the terms of the 1882 act.[23] However, in the interim, Congress in 1912 had enacted a statute providing for the sale (rather than allotment) of all unallotted reservation lands. On remand from the Eighth Circuit, the United States (for the first time) introduced this 1912 act as an absolute defense. The Eighth Circuit affirmed the dismissal of Chase, Jr.'s complaint on the ground that the 1912 act had repealed the 1882 allotment provisions and had extinguished Chase, Jr.'s prior right to an allotment under the 1882 act.[24] In this Court, Chase, Jr. contended:

> [He] had a vested right to an allotment "under the treaties and acts of Congress as they existed at the time when" the allotment was "selected and claimed".[25]

This claim was denied on the ground that Chase, Jr.'s "mere right under the Act of 1882" was subject to the continuing power of Congress to alter its statutory allotment plans in light of changing conditions.[26]

Additionally, respondents cite *Nadeau v. Union Pacific R. R.*, 253 U.S. 442 (1920), as a case decided on the basis

23. *Chase v. United States*, 238 F. 887 (8th Cir. 1916).

24. *Chase v. United States*, 261 F. 833 (8th Cir. 1919).

25. 256 U.S. at 6.

26. 256 U.S. at 7-8. In *Clay v. United States*, 282 F. 268 (8th Cir. 1922), this reasoning was applied to other Omaha allotment selections. *See The Constitutional Power of Congress to Enact Legislation Concerning the Allotment of Lands to the Mission Indians of California*, 56 I.D. 102, 109 (1937).

of respondents' asserted general principle that rights vest upon selection of an allotment.[27] However, respondents' analysis is again faulty. *Nadeau* involved an 1861 treaty which "contemplated future allotments."[28] Allotments were selected in 1862 and 1863.[29] In 1864, the Secretary approved the allotments. Contrary to respondents' characterization of this case, this Court in fact held that Congress retained continuing power to alter the treaty allotment plan after allotments were selected:

> It seems plain that, at least, until actually allotted in severalty (1864) the lands were but part of the domain held by the Tribe. . . . The power of Congress, as guardian for the Indians, to legislate in respect of such lands is settled. *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 653; *United States v. Rowell*, 243 U.S. 464, 468; *United States v. Chase*, 245 U.S. 89.[30]

Similarly, respondents Williamson and Bowen completely mischaracterize this Court's 1944 decision, *Arenas v. United States*, 322 U.S. 419. Respondents contend that *Arenas* "established beyond doubt that Indian allottees' rights vest upon filing their allotment application;"[31] and respondents further contend that in *Arenas* "this Court compelled recognition of the applicant's interest in an allotment by requiring issuance of the trust patent."[32] However, neither of these contentions is correct—this Court neither announced a rule of vesting, nor mandated issuance of a

27. Brief for Respondents Williamson and Bowen at 57 note 116.

28. 253 U.S. at 446.

29. The treaty provided that a census be taken to indicate those Indians desiring allotment and that, thereafter, lands be assigned to the applicants; the census and assignments occurred between July, 1862, and November, 1863. 253 U.S. at 445.

30. 253 U.S. at 446.

31. Brief for Respondents Williamson and Bowen at 32.

32. Brief for Respondents Williamson and Bowen at 78.

trust patent. Rather, *Arenas* simply held that the prevailing congressional policy regarding Mission Indian allotment, as expressed in the operative federal legislation, was that such allotment should be made;[33] that to the extent that the legislation lodged discretion in the Secretary of the Interior regarding whether to allot, he had already exercised that discretion in favor of allotment;[34] and, finally, that a subsequent reversal in secretarial policy could not defeat the will of Congress:

> It appears that the sole reason for denying a patent is a departmental change of policy, by which the Secretary now disagrees with the allotment policy prescribed for these Indians by the Acts of 1891 and 1917. . . .
>
> The Secretary has endeavored to persuade Congress that treatment other than the allotment policy embodied in its legislation would be more advantageous for the Indians. [The Secretary's failures, in 1935 and 1937, to convince Congress to repeal the allotment legislation are then detailed].
>
> We think the grounds advanced by the Government . . . are inadequate to establish as a matter of law that the petitioner has no legal right to a patent. Congress not only has failed to deny these allotment rights by legislation, but has rejected urgent and reiterated appeals from the Department to do so.[35]

Having thus denied the Secretary's claim that departmental policy should be permitted to prevail over congressional policy, this Court remanded the case for trial on the following legal standard:

> Arenas is entitled to invoke the applicable legislation as it stands in determining whether he is entitled to

33. 322 U.S. at 425-26.

34. *Id.* at 427, 428.

35. *Id.* at 432-33.

> have completed the all but fully executed policy of allotment [footnote omitted].[36]

Contrary to respondents' assertion, this Court did not in any sense whatsoever hold—let alone "establish beyond doubt"—that rights vest upon the filing of an application for allotment. Nor did this Court compel issuance of the trust patent.[37]

Thus, the *Arenas* opinion suggests a fundamental difference between the following two issues: (1) the power of the Secretary of the Interior to refuse to complete unconsummated allotments provided for by existing and operative allotment legislation; vis-a-vis (2) the power of the Congress to terminate unconsummated allotments through the repeal of allotment legislation.

The instant case deals with this second issue. The authorities relevant to this issue, and confirming this congressional power, have been set forth at length in the Brief for Petitioner. Respondents Williamson and Bowen's authorities, however, are in fact not germane to this issue of congressional power. Many of them are, instead, relevant only to

36. *Id.* at 433-34.

37. On remand, the Secretary was ordered to approve the allotments. *Arenas v. United States*, 60 F.Supp. 411 (S.D. Cal. 1945). On appeal to the Eighth Circuit, the United States conceded that this Court's prior opinion "construed the 1917 Act. . . as removing from [the Secretary] discretion as to whether allotments should be made at all." *United States v. Arenas*, 158 F.2d 730, 739 (8th Cir. 1946). The Eighth Circuit found:

> The "full record" in this case clearly established that "a departmental change of policy" was the real reason behind the disapproval of the 1927 allotment.

Id. at 744. Finally, the Eighth Circuit concluded that under the applicable standard for determining Arenas' allotment rights—"the applicable legislation as it stands" (*Id.* at 746)—Arenas was entitled to the issuance of a patent. Subsequently, this Court denied certiorari. 331 U.S. 842 (1947).

the first issue—the power of the Secretary of the Interior. Moreover, respondents' remaining authorities are but relevant to yet another distinct issue—relating neither to the power of Congress to terminate allotment, nor to the power of the Secretary to override allotment. These authorities simply deal with defining the nature of an Indian's rights under specific existing and operative allotment provisions—determining, for example, the power of an Indian to convey, or otherwise transact with respect to, his allotment expectancy under an existing legislative provision. This will now be demonstrated.

a. Authorities Dealing With the Power of the Secretary of the Interior to Refuse to Complete Allotment

Respondents Williamson and Bowen rely on *Leecy v. United States*, 190 F. 289 (8th Cir. 1911), *appeal dismissed* 232 U.S. 731 (1914), and *Ballinger v. United States ex rel. Frost*, 216 U.S. 240 (1910), as limiting the power of Congress to alter allotment plans.[38] However, as does *Arenas v. United States*, 322 U.S. 419 (1944) (discussed at 8-10 *supra*), these cases simply stand for the proposition that an Executive officer—the Secretary of the Interior—lacks the power to thwart allotment mandated by existing and operative allotment legislation; these cases decidedly do not deal with Congress' power to amend allotment plans.

In *Leecy*, plaintiff was held to unquestionably have a right, under existing allotment legislation, to an allotment of certain selected lands. However, the Secretary refused to make that allotment on the ground that he had reserved these lands from allotment. The Eighth Circuit reasoned as follows:

38. Brief for Respondents Williamson and Bowen at 42, 62.

> The power of Congress over the whole subject of our relations to the Indians is plenary. *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299. But it does not follow, because Congress makes a valid law and intrusts its execution to the head of an executive department, with power to make rules and regulations for its execution, that he is thereby clothed with plenary power to make such rules and regulations as would not aid in the execution of the law but nullify its provisions. . . .
>
> Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment, he could withdraw substantially all of them, if that seemed in his judgment best, and under the contention of the government he would be executing an allotment law under rules and regulations prescribed, when in fact he nullified the law by withdrawing the very land from allotment which Congress had authorized to be so distributed. The law was to be executed under, not nullified by, rules and regulations.[39]

The opinion concluded:

> A strong argument is made tending to show that power should be vested in the President or some other officer of the government to withhold from allotment lands specially needed for the use of the tribe as a whole, but such arguments should be addressed to Congress rather than to the courts. If such a law would be wise, that is no reason why an executive department should make one, or the courts sustain it in doing so.[40]

Similarly, in *Ballinger v. United States ex rel. Frost,* 216 U.S. 240 (1910), this Court struck down another secretarial attempt to override a congressional allotment policy embodied in operative allotment legislation. In this case, under the existing allotment act, an allotment had been selected, a certificate of allotment had been issued, and a

39. 190 F. at 292.
40. *Id.* at 293.

patent had been executed. Thereupon, by the express terms of the allotment act, the allottee's title was fixed and absolute.[41] Subsequently, the Secretary of the Interior purported to withdraw the involved lands from allotment. Finding no authority for such secretarial action in the applicable legislation, this Court held:

> Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation.[42]

Respondents also cite *Payne v. Central Pac. Ry.,* 255 U.S. 228 (1921), *Payne v. New Mexico,* 255 U.S. 367 (1921), and *Wyoming v. United States,* 255 U.S. 489 (1921), as supporting respondents' proposition that "upon filing a sufficient application" rights are vested which are not subject to further alteration by congressional action.[43]

41. 216 U.S. at 247, 249. *See United States v. Reynolds,* 250 U.S. 104, 108-09 (1919).

42. 216 U.S. at 249. *See Garfield v. United States ex rel. Goldsby,* 211 U.S. 249 (1908), where this Court characterized this kind of issue as follows:

> In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. . . [A]s has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

211 U.S. at 262.

43. Brief for Respondents Williamson and Bowen at 72-73, 31 note 58, 31 note 59, 31 note 61. As demonstrated in the Brief For Petitioner at 51, in these cases this court found vested rights on the basis that, in connection with their selections, the applicants each parted with valuable consideration. For example, this Court stated in *Wyoming v. United States*:

> Acceptance of such a [statutory] proposal and full compliance

These public lands cases, however, each involve efforts by the Secretary of the Interior or the Commissioner of the General Land Office to block selections made under fully operative federal legislation. The power of Congress to amend that legislation was not in issue.

b. Authorities Relating Neither to the Power of Congress Nor of the Secretary to Terminate Allotment, and Merely Determining Rights Under Existing and Operative Allotment Legislation

Respondents Williamson and Bowen cite the decisions *Doe v. Wilson*, 64 U.S. (23 How.) 457 (1859), *Crews v. Burcham*, 66 U.S. (1 Black.) 352 (1861), *Elwood v. Flannigan*, 104 U.S. (14 Otto) 562 (1881), and *Pka-O-Wah-Ash-Kum v. Sorin*, 8 F. 740 (C.C.N.D. Ill. 1881), in support of their claim that Congress in 1968 could not alter the 1926 Northern Cheyenne allotment plan.[44] These cases each involve lands reserved to individual Pottawatomie Indians under a treaty of 1832. Each case deals only with the power of the Indian beneficiary of that reservation to convey his reserved lands prior[45] to actual selection of the reserved

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> therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the [relinquished tract]. . .Of course, the State's right under the selection was precisely the same as if in 1912 it had made a cash entry of the selected land under an applicable statute, for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration.

255 U.S. at 497. *See Payne v. Central Pac. Ry.*, 255 U.S. 228, 235-36 (1921), and *Payne v. New Mexico*, 255 U.S. 367, 370 (1921).

44. Brief for Respondents Williamson and Bowen at 11 note 24, 31 note 63, 78.

45. Therefore, contrary to respondents Williamson and Bowen's claims, the cases do not involve the rights of allottees who have "selected the parcel and file a proper application." (Brief For Respondents Williamson and Bowen at 11).

lands.[46] The power of Congress (or of the Secretary) to alter or otherwise affect the individual Indian's interest in the reserved lands was simply not at issue in these cases.

Mullen v. United States, 224 U.S. 448 (1912), is also cited by respondents in support of their claim that Congress lacked power to alter the 1926 Northern Cheyenne allotment plan.[47] This case too deals only with the power of an individual Indian to convey lands distributed to him —in this instance, lands which had been alloted[48] to him under existing and operative allotment legislation. This Court simply interpreted the operative allotment legislation and concluded that a power to transfer existed. There was no issue as to Congress' power to subsequently limit the allottee's right to convey; on the contrary, the only subsequent congressional action specifically confirmed that right.[49]

Additionally, respondents Williamson and Bowen cite the public lands decision *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428 (1892), as limiting the power of Congress in the premises. This case, however, was simply a dispute between competing applicants for public lands under existing legislation—congressional (or even secretarial) power was not at issue. The applicant who had "made application to the proper land

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46. Such a power was found to exist on the basis that the treaty right to the reservation was founded upon valuable consideration and that a subsequent act of Congress specifically granted a power to convey. *Crews v. Burcham*, 66 U.S. (1 Black.) 352, 356-57. *See Mullen v. Pickens*, 250 U.S. 590, 594-95 (1919).

47. Brief For Respondents Williamson and Bowen at 12 note 31, 40 note 81, 78.

48. The case was decided on the basis that the lands had in fact been allotted prior to the transfer in question. 224 U.S. at 457.

49. 224 U.S. at 457-58. *See Mullen v. Pickens*, 250 U.S. 590, 595 (1919).

office for a United States patent, paid the price required by law, and obtained the ordinary certificate of purchase"[50] prevailed on the following rule of public lands law:

> It is a general rule, in respect to the sales of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government. . . .[51]

Similarly respondents Williamson and Bowen also cite the case *Hy-Yu-Tse-Mil-Kin v. Smith*, 194 U.S. 401 (1904), as limiting the power of Congress to alter allotment plans.[52] That case, however, is not in any sense concerned with the power of Congress (or of the Secretary) to amend such provisions. *Hy-Yu-Tse-Mil-Kin* deals only with the question of whether or not a particular Indian was qualified for allotment under an existing and operative allotment act.[53]

Finally, the decisions of the Department of the Interior relied on by respondents Williamson and Bowen will now be addressed.

c. Decisions and Opinions of the Department of the Interior

Respondents Williamson and Bowen rely on three Department of the Interior decisions and opinions, *Raymond Bear Hill*, 52 I.D. 688 (1929), *Allotment Selections on the*

50. 145 U.S. at 429.

51. 145 U.S. at 432. *See Wyoming v. United States*, 255 U.S. 489, 497-98 (1921).

52. Brief For Respondents Williamson and Bowen at 62, 11 note 24, 31 note 63, 78.

53. This Court held that the Indian was entitled to allotment of lands which had been previously denied her under an erroneous departmental interpretation of the allotment act.

Fort Belknap Indian Reservation, 55 I.D. 295 (1935), and *Rights of Indians to Allotments In San Juan County, Utah*, 57 I.D. 547 (1942), as authority for the proposition that when the original Northern Cheyenne allottees applied for their allotments, Congress lost the authority to repeal the provision calling for the future allotment of minerals.[54] However, the following points must be made in regard to these Interior decisions and opinions:

(1) Assuming *arguendo* that these Interior decisions and opinions establish such a principle, that principle would in any event be in conflict with the relevant decisions of this Court, set forth in the Brief for Petitioner and in this Reply Brief, which establish Congress' power to enact the 1968 Amendment. Thus, if the Interior decisions and opinions held as respondents argue, they would be entitled to no weight.

(2) Moreover, respondents' analyses of these decisions and opinions is, in fact, both incorrect and incomplete. Respondents have not only mischaracterized their holdings, but have also failed to cite other relevant Interior decisions which explain, narrow, or are in conflict with these three decisions. This will now be demonstrated.

Raymond Bear Hill involves the interpretation of an amendment to an allotment act. The original allotment act provided for the immediate[55] allotment of tribal lands including minerals. The subsequent amendment reserved from allotment the oil and gas in "undisposed of" lands.

54. Brief For Respondents Williamson and Bowen at 30, 31 note 61, 31 note 62, 62, 79.

55. In the Northern Cheyenne Allotment Act of 1926, Congress specifically withheld immediate allotment of minerals—this key factual difference of and by itself makes *Raymond Bear Hill*, at best, marginally relevant to the instant case.

The opinion, in essence, made nothing more than an interpretation of the amendment language "undisposed of." It concluded that the statutory term encompassed all lands which had not, as of the time of the amendment, been validly selected for allotment. However, in reaching this conclusion, the First Assistant Secretary seemed to postulate a rule that, upon selection, certain rights are acquired which are insulated from further Congressional action. Although he cited no direct authority for this proposition, the First Assistant Secretary did cite *Wyoming v. United States,* 255 U.S. 489 (1921), *Payne v. New Mexico,* 255 U.S. 367 (1921), *Payne v. Central Pac. Ry.,* 255 U.S. 228 (1921), and *Hy-Yu-Tse-Mil-Kin v. Smith,* 194 U.S. 401 (1904), in support of his proposition. These cases, however, as has been demonstrated in this Reply Brief (at 13-14, 16 *supra*), provide no support for the First Assistant Secretary's postulate.

Moreover, two-and-a-half years later, in another opinion on the issue involved in *Raymond Bear Hill,* the First Assistant Secretary clearly appears to have retreated from his proposed rule of law that rights vest on selection—relying instead, simply on the prior departmental interpretation of the statutory term "undisposed of." *Mineral Reservations In Trust Patents For Allotments to Fort Peck and Uncompahgre Ute Indians,* 53 I.D. 538 (1931). Thus, by 1931, the Department itself had tacitly acknowledged the infirmity of the suggested rule of vesting in *Raymond Bear Hill.*[56]

56. *See also Assiniboine & Sioux Tribe v. Nordwick,* 378 F.2d 428 (9th Cir. 1967), *cert. denied* 389 U.S. 1046 (1968), involving the same allotment legislation. The Ninth Circuit held that the reservation of minerals on "undisposed of" lands did not apply to lands as to which there had been a prior homestead entry. This holding was purely an interpretation of the statutory language. The Court acknowledged, however, that Congress had the power to reserve minerals on such entered lands. 378 F.2d at 428-29.

Respondents also rely on the opinion of the Solicitor of the Department of the Interior, *Allotment Selections On The Fort Belknap Indian Reservation,* 55 I.D. 295 (1935), to support their argument that rights to the future minerals allotment vested at the time of selection. This opinion, however, is really nothing more than an interpretation of the provision in the Indian Reorganization Act of 1934[57] prohibiting further allotment of Indian lands. The issue was simply whether or not Congress intended this bar to apply to twenty-five specific allotment selections which had been pending for nine years. It was held that Congress did not intend to bar the completion of these allotments;[58] and, although the opinion does include some discussion of the nature of the right acquired by selection, it did *not* hold that selection deprives Congress of the power to subsequently alter the allotment plan. In fact, less than two months before issuance of this opinion, the Solicitor specifically held that the Indian Reorganization Act provision prevented the Secretary from issuing allotment patents on the Quinault Indian Reservation. *Patents For Lots In The Village Of Taholah Quinaielt Reservation,* Op. Sol. I.D., M.27770, May 22, 1935 (unpublished).

Moreover, two years later in *The Constitutional Power Of Congress To Enact Legislation Concerning The Allotment Of Lands To Mission Indians Of California,* 56 I.D. 102 (1937), the Solicitor explicitly acknowledged the absence of any court or departmental decision which, on constitutional grounds, militated against the enactment of legislation cutting-short the completion of allotment of

57. Act of June 18, 1934, § 1, 48 Stat. 984.

58. 55 I.D. at 300, 304.

pending selections.[59] The Solicitor held:

> Mere selection thus is not enough to establish a vested property right in the individual Indian. The land in addition must be set apart to the allottee, and this is usually accomplished by the issuance of a trust patent for the land after the allotment selection has been approved by the Secretary of the Interior.[60]

Finally, respondents cite *Rights Of Indians To Allotments In San Juan County, Utah*, 57 I.D. 547 (1942), in support of their claim that selection prohibits further congressional action. This Solicitor's opinion, however, announces no such rule. At issue were public lands allotments to Indians and a 1933 act which prevented "further allotments" of that sort in San Juan County. In fact, the Solicitor's opinion did no more than interpret the 1933 act as not applying to the involved allotment applications. These applications had been filed in 1930 after the applicants had settled on the land. The Secretary of the Interior refused to approve the applications in anticipation of the enactment of further legislation dealing with these allotments. In the course of his analysis, the Solicitor found that under the allotment act and then-applicable regulations, the Indian was entitled to prompt approval and the Secretary had no discretion to deny this approval. The Solicitor carefully pointed out that his analysis was based on principles

59. This 1937 Solicitor's opinion described the holding in *Allotment Selections On The Fort Belknap Indian Reservation*, 55 I.D. 295 (1935), in the following terms:

> That opinion, however, rested primarily on the premise that the inhibition against further allotments was not intended to prevent the completion of allotments, mandatorily provided for in the Fort Belknap allotment act, for the benefit of the few remaining unallotted Indians whose right to allotment under the allotment act became fixed long prior to the passage of the prohibitory leglislation.

56 I.D. at 107.

60. 56 I.D. at 109.

governing settlement upon public lands, and, that the rules governing the allotment of tribal property were quite different.[61] Under public lands law, it was the act of settlement which created rights in the Indian. Moreover, the opinion specifically states that the application itself conferred no rights:

> An application without more confers no right on anyone. But an application by an Indian qualified under the statute and supported by settlement as required by the statute confers upon the applicant an absolute right to allotment and patent.[62]

2. *The Argument[63] That the 1926 Congress Was Required to Expressly Reserve a Power to Alter the Plan For Future Allotment of Minerals Is Invalid. Moreover, Respondents' Reliance On the Terms of Other Allotment Acts Is Misplaced.*

Respondents claim that the congressional power to alter the 1926 plan for future allotment of the minerals "must be specifically set forth in the [1926] allotment act".[64] This claim is made on two bases:

(a) case authority allegedly mandating such an express reservation of power;[65] and

(b) the terms of certain other allotment acts which, respondents argue, may be used for the purpose of drawing

61. The Solicitor's opinion states:

> While it is true that there are departmental decisions containing statements to the effect that no vested rights are acquired by the mere filing of an application for allotment, most of these decisions deal with allotments of Indian lands, the authority of Congress to change the conditions under which allotments may be made, and the power of Congress to include reservations in patents issued in pursuance of selections.

57 I.D. at 550.

62. 57 I.D. at 551.

63. Brief for Respondents Williamson and Bowen at 40-44.

64. *Id.* at 40.

65. *Id.* at 40, 41-42.

an inference regarding Congress' intent in enacting the Northern Cheyenne Allotment Act of 1926.[66]

However, as will be demonstrated below, both these analytical bases are faulty.

Moreover, assuming *arguendo* that respondents' theory is correct, the 1926 Congress did expressly declare—in sections 1 and 3 of the 1926 Act—its continuing power over the allotment plan. Indeed, the section 3 declaration immediately follows, and clearly qualifies, the provision announcing the plan to transfer the minerals and natural deposits fifty-years hence.[67]

a. The Case Authority Claimed By Respondents to Require a Specific Reservation of a Congressional Power to Alter

The Brief for Petitioner[68] sets forth the substantial body of decisions of this Court which affirms Congress' inherent continuing power to adjust enacted schemes for the allocation of tribal property in view of changing conditions. The cases cited by respondents Williamson and Bowen do not detract from this principle.

Respondents cite *Leecy v. United States*, 190 F. 298 (8th Cir. 1911), as a "rather pointed rejection of any implied power of the federal government" to alter allotment legislation.[69] However, this case, as already demonstrated in this Reply Brief,[70] was not in any sense concerned with the power of Congress. *Leecy*, in fact, was an unequivocal rejection of any power in an *Executive officer*—

66. *Id.* at 40, 42-44.
67. *See* Brief for Petitioner at 17-18.
68. *Id.* at 37-39.
69. Brief for Respondents Williamson and Bowen at 42.
70. *See* pages 11-12 *supra*.

the Secretary of the Interior—to thwart completion of allotment required under existing and operative legislation; the power of *Congress* was simply not in issue.

Similarly, respondents state that *Arenas v. United States*, 322 U.S. 419 (1944), "rejected any implied federal power" to amend allotment provisions.[71] But this case too dealt only with the power of the *Secretary* to refuse to comply with congressional allotment policy embodied in existing law.[72] *Arenas*, like *Leecy*, did not in any sense deal with the power of *Congress* to amend allotment legislation.

Respondents cite *Mullen v. United States*, 224 U.S. 448 (1912), as standing for the proposition that a congressional power to amend allotment legislation "may not be inferred from Congress' general plenary power."[73] However, as already demonstrated in this Reply Brief,[74] the congressional power to amend was not in issue in *Mullen*—this Court simply interpreted the existing and operative allotment legislation to determine an allottee's power to alienate his allotment.

However, respondents do cite *Woodward v. DeGraffenried*, 238 U.S. 284 (1915), which did actually involve a congressional alteration of an allotment plan. But, contrary to respondents' claim, this case did not in fact deal with or discuss the question of whether Congress must specifically reserve a power to amend. Rather, the case is merely illustrative of an instance in which allotments under an agreement ratified by statute had been so far consummated as to preclude subsequent divestment by Congress. In this case,

71. Brief for Respondents Williamson and Bowen at 42.
72. *See* pages 8-10 *supra*.
73. Brief for Respondents Williamson and Bowen at 40 note 81.
74. *See* page 15 *supra*.

an allotment had been selected and a certificate of allotment had been issued. Subsequently, an agreement providing for general allotment of all tribal lands was negotiated and ratified by the Indians and Congress. This Court found that the tribe and the United States intended by that agreement to fully confirm previously made allotments. Moreover, where an original allottee had died prior to adoption of the agreement (as was the case in *Woodward*), the agreement specifically confirmed title to the allotment in the heirs under Creek law. In these circumstances, it was held that Congress could not later supplant these Creek law heirs by Arkansas law heirs. Thus, in an instance where the allotment had been fully selected, confirmed in the original allottee through the issuance of a certificate of allotment, and then, on the basis of a fully-ratified agreement, completely confirmed in specific heirs, this Court held that Congress could not subsequently strip the heirs of that allotment. The instant case, dealing merely with a statutory plan for a future allotment of minerals, is clearly distinguishable.

Respondents' remaining authority for the proposition that Congress must specifically reserve a power to amend allotment legislation is the Tenth Circuit decision, *Adams v. Osage Tribe*, 59 F.2d 653 (1932), *cert. denied*, 287 U.S. 652 (1932). Since *Adams* is factually very close to the case at hand, it will be discussed in some detail.

i. *Adams v. Osage Tribe*

Adams upheld, against Fifth Amendment attack, two amendments of the Osage Allotment Act of 1906;[75] each amendment extended the period of tribal ownership of

75. Act of June 28, 1906, 34 Stat. 539.

minerals beneath allotted lands. Respondents Williamson and Bowen assert that the Tenth Circuit made its decision "because" Congress expressly reserved a power to so amend the original allotment act.[76] This is an erroneous characterization of the Tenth Circuit's analysis, for the following reasons.

First, the second amendment at issue in *Adams* was in fact *not* based upon an existing and operative express reservation of power to amend. This is revealed by careful analysis of the two involved amendments. The 1906 act promulgated a plan for the ultimate distribution in severalty of the lands and funds of the tribe. Each tribal member was permitted three allotment selections of 160 acreas each, and an additional pro-rata distribution of the remaining lands;[77] one selection was to be an inalienable and nontaxable "homestead"; the remainder of the allotment, termed "surplus", was to be alienable and taxable in the event the allottee were declared "competent".[78] The "competency" provision specifically barred the sale of minerals, reserved them to the tribe for twenty-five years, and provided that the minerals would "become" the property of the "individual owner" of the surplus at the end of those twenty-five years, unless Congress provided otherwise:

> [N]othing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years . . . *And provided further*, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said

76. Brief for Respondents Williamson and Bowen at 40 note 80.
77. Act of June 28, 1906, §2, paras. 1-5, 34 Stat. 540-41.
78. Id. at §2, para. 7.

> twenty-five years, unless otherwise provided for by Act of Congress.[79]

Respondents make much of the proviso "unless otherwise provided by Act of Congress". However, that proviso was dropped in the course of enacting a 1921 amendment of the 1906 act which added fifteen years to the minerals reservation:

> That all that part of the Act of June 28, 1906 . . . which reserves to the Osage Tribe the oil, gas, coal or other minerals covered by the lands for the selection and division of which provision is made in that Act is hereby amended so that the oil, gas, coal, or other minerals covered by said lands are reserved to the Osage Tribe for the period ending April 7, 1946. . . .[80]

Significantly, an originally proposed version of this amendment would have additionally carried forward the proviso "unless otherwise provided for by Act of Congress".[81]

The *absence* of this proviso, however, did not deter Congress from again amending the provision in 1929 to add yet another twelve years to the term of the minerals reservation—the phrase "for the period ending April 7, 1946" contained in the 1921 amendment was replaced by the phrase "until the 8th day of April, 1958, unless otherwise provided by Act of Congress".[82] Thus, in 1929, Congress re-introduced the "unless otherwise provided" stipulation.

In 1931, after these legislative events, the case *Adams v. Osage Tribe*[83] was brought. In that case plaintiffs were purchasers of "surplus" allotments who claimed title to the

79. *Id.*

80. Act of March 3, 1921, 41 Stat. 1249.

81. 61 Cong. Rec. 2053 (1921).

82. Act of March 2, 1929, 45 Stat. 1478.

83. 50 F.2d 918 (D.C. Okla. 1931).

minerals beneath the allotments on the basis that the initial twenty-five year period of the minerals reservation had expired. Plaintiffs attacked both the 1921 and 1929 extensions of that period, on the ground that Congress could not, consistent with the Fifth Amendment, deprive them of title to the minerals. Both the district court and the Tenth Circuit denied these claims.

As demonstrated above, the "unless otherwise provided" proviso was dropped in the 1921 amendment. Therefore, the Tenth Circuit's upholding of the 1929 amendment could not in fact be based on the existence of an express reservation of power to enact such an amendment. Accordingly, respondents' assertion that *Adams* is founded on the existence of such a proviso is erroneous as a matter of fact.

Moreover, there is a second and more important flaw in respondents' characterization of *Adams*--it does not square with the legal analysis actually performed by the Tenth Circuit, which did not rest on the existence of any specific reservations of power to amend. That legal analysis will now be explicated; it will be seen that it parallels the legal analysis advocated by petitioner herein, to wit—that the initial reservation of minerals in the original act withheld those minerals from allotment and made them subject to Congress' inherent continuing power to alter the plan for their ultimate distribution. The Tenth Circuit reasoned as follows.

The Osage Allotment Act (in the same manner as the Northern Cheyenne Allotment Act) states in plain terms that the minerals "are hereby reserved to the Osage Tribe for a period of twenty-five years," lodges leasing authority

in the tribal council, and provides that the proceeds of mineral development are tribal property:

> The diction used is simple and plain, and its meaning clear to common understanding. The minerals were not to be sold, they were reserved to the tribe for twenty-five years, leases for all minerals to be made through its tribal council with the Secretary's approval, and the royalties on minerals produced paid to the tribe, and the minerals in the allotted lands were to become the property of the individual owners of the lands from and after April 8, 1931, unless otherwise provided by Act of Congress.[84]

Furthermore, the Osage allotment patents (as the Northern Cheyenne allotment patents) specifically "reserved" the minerals to the tribe.[85]

To the allottees contention that—

> . . . these legislative provisions for the administration of the trust estate cannot be given their obviously intended effect, that the act did not divide the land into two estates—(a) surface and (b) minerals, and then provide for deeds to allottees covering only the surface; that . . . the allottees took . . . titles to the minerals as vested remainders. . . .[86]

the Tenth Circuit responded:

> "The 1906 act made no allotment of the mineral estate in the lands; it remained tribal property." The claim that allottees took vested estates in remainder on the issuance of deeds to their allotments is clearly without merit.[87]

Finally, the *Adams* court stated that a proper analysis rested on basic concepts of congressional power to promulgate allotment plans, withhold minerals from allotment,

84. 59 F.2d at 655.
85. *Id.*
86. *Id.*
87. *Id.* at 656.

and subsequently alter the plans for future distribution of those withheld minerals:

> But the discussion so far has been largely directed to propositions advanced by appellants' counsel. In so doing we think the issues of law that control have been too narrowly restricted. The Congress had full power, when it passed the Allotment Act, to make such provisions for safeguarding and administering the communal estate of the tribe, and dividing it in severalty among the members of the tribe, as its informed judgement might dictate, for the benefit of all concerned—whether it would be equitable and just that all tribal property, including minerals under the land, be at once allotted among the members in severalty. There must have been a doubt, well founded in later developments, that minerals, since proven to be of great wealth, could not then be equitably divided, and so Congress chose a method by which that could be and is being accomplished. For that purpose the act provided that the minerals under the lands to be allotted were reserved to the Osage Tribe and were not to be sold. The necessary effect of this was to withhold the minerals from division, and set them apart from the lands to be divided, for the use and benefit of the tribe, not disturbing the tribe's communal equitable estate in them. . . And so we say the reservation in the Allotment Act and the Acts of March 3, 1921, and March 2, 1929, were "but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued." *Gritts v. Fisher*, 224 U.S. 640, 648, 32 S. Ct. 580, 583, 56 L. Ed. 928.[88]

88. *Id.* at 656-57. Subsequent to *Adams* Congress further amended the Osage Act, culminating in a perpetual reservation of the minerals to the tribe. Act of June 24, 1938, 52 Stat. 1034; Act of October 6, 1964, 78 Stat. 1004.

b. The Other Allotment Acts From Which Respondents Claim This Court May Draw Inferences Regarding the Intent of Congress in Enacting the Northern Cheyenne Allotment Act

Petitioner has argued that the meaning of the Northern Cheyenne Allotment Act of 1926 should be determined from the plain language of the Act,[89] the corroborating language of the allotment patents,[90] the circumstances surrounding enactment, in particular the needs and expressed desires of the Tribe,[91] and the legislative history of the Act.[92] This method for the interpretation of a specific allotment act, which accords preeminent weight to the actual language of the *involved* act and the circumstances surrounding *its* enactment, in fact conforms completely to the method recently prescribed by this Court for interpreting allotment legislation in *DeCoteau v. District County Court*, ___ U.S. ___, 43 L.Ed.2d 300, 95 S.Ct. 1082 (1975). The "face of the Act", its "surrounding circumstances", and its "legislative history" are to be accorded paramount weight.[93]

However, respondents Williamson and Bowen claim that this technique should be discarded in favor of a method directly contrary. They assert that this Court should look to the language of certain other independent allotment acts for the purpose of drawing inferences regarding Congress' intent in enacting the Northern Cheyenne Act. In support of this method of analysis they cite[94] one case, *Monson v.*

89. Brief for Petitioner at 15-18.

90. *Id.* at 18-20.

91. *Id.* at 58-66.

92. *Id.* at 66-76.

93. 43 L. Ed. 2d at 314. *Accord, Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87, 89-91 (8th Cir. 1975); *United States ex rel. Cook v. Parkinson*, 525 F.2d 120, 122-23 (8th Cir. 1975).

94. Brief for Respondents Williamson and Bowen at 43.

Simonson, 231 U.S. 341 (1913), which in fact lends no support. *Monson* did not compare the language of independent acts; rather, it compared language contained within different portions of a single act.

Furthermore, careful analyses of the other allotment acts cited by respondents fully confirm the inherent weakness of the comparative technique advocated. The results of such analyses are described in the Brief for Petitioner.[95] In short, each of those other allotment acts is generically different from the Northern Cheyenne Act. They in fact embody massive assaults on the tribal system of property. For example, each of them provides for the disposition of essentially all of the lands of the reservation, through allotment to members or sale to whites. Significantly, none of them contains provisions remotely comparable to the control and management stipulations in sections 1 and 3 of the Northern Cheyenne Act.

To draw inferences from these other acts about Congress' intent in enacting the uniquely limited Northern Cheyenne Act—the last original allotment act Congress was ever to enact—is simply not justifiable. And, to ask, as respondents do, that this Court infer that Congress intended to relinquish aspects of management and control in the Northern Cheyenne Act which were not relinquished in these other acts, is clearly improper.

More specifically, there is no sound basis for concluding that Congress, in enacting these other acts, actually considered these various reserved power provisos essential to the preservation of a power to amend. Consider, for example, the Osage Act of 1906.[96] In that act the proviso "unless

95. Brief for Petitioner at 76-78.

96. Act of June 28, 1906, 34 Stat. 539.

otherwise provided by Act of Congress" appears in the portion of the act (§2, 7th para.) which, as explained at 25 *supra*, deals with the rights of an allottee who might be declared "competent". Such an allottee is, by that part of the act, permitted to convey the "surplus" portion of his allotment. However, he is specifically prohibited from selling the minerals beneath those "surplus" lands:

> [N]othing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years. . . *And provided further*, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.[97]

The final "unless otherwise provided" clause has reference *only* to the minerals beneath "surplus" lands held or sold by "competent" Indians.[98] Moreover, the portion of the Osage Act (§3) which in fact reserves *all* minerals beneath the reservation to the tribe does *not* include an "unless otherwise provided" clause. Thus, the reserved power proviso contained in the Osage Act applies only to a portion of the reserved minerals, and, therefore, does not in fact support the subsequent blanket extensions of the period of the minerals reservation.

Finally, as discussed at 26 *supra*, Congress alternately dropped and re-introduced an "unless otherwise provided" clause in subsequent amendments of the Osage Act. This

97. *Id.* at §2, 7th para.

98. The "unless otherwise provided" clause qualifies only the future interest in the minerals of the "individual owner." Since the act otherwise consistently uses the term "member" when referring to actual allottees, it clearly appears that the provisio is directed only at "surplus" lands held or sold by "competent" allottees.

cavalier treatment of the proviso confirms that Congress has not viewed its power to amend as being dependent on an express reservation of authority.

Similarly, study of the legislative history of the Crow Allotment Act of 1920[99] reveals that the comparable proviso contained in that act was in fact not viewed by Congress as essential to the preservation of a power to extend the period of the minerals reservation. The originally proposed Crow act preserved the minerals to the tribe for fifty-years and did not include specific language reserving power to extend that period.[100] However, the House committee recommended changing the period of the minerals reservation from fifty-years to twenty-five years.[101] This suggested amendment was adopted by the House after vigorous debate.[102] In the course of that debate, a compromise was suggested:

> Mr. McKeown. Would it help the situation if it were provided that "said period of time may be extended by Congress"?
>
> Mr. Walsh. Congress could do that without the right being reserved. . . .[103]

The Senate refused to accept the amendment to twenty-five years and a conference committee was appointed.[104] The Senate conferees accepted the House amendment qualified by the language "unless otherwise ordered by Congress."[105] Thus the compromise suggested by Mr.

99. Act of June 4, 1920, 41 Stat. 751.

100. *Hearings on S.2890 Before the Senate Comm. on Indian Affairs*, 66th Cong., 1st Sess. at 4, 13 (1919).

101. H.R. Rep. No. 468, 66th Cong., 1st Sess. at 2 (1919).

102. 59 Cong. Rec. 6010-11 (1920).

103. 59 Cong. Rec. 6010 (1920).

104. 59 Cong. Rec. 6568, 6668 (1920).

105. H.R. Rep. No. 1043, 66th Cong., 2d Sess. at 2, 4 (1920).

McKeown was adopted. The proviso, therefore, was included simply to resolve a conflict between the two houses over the initial duration of the minerals reservation. It was decidedly not included to preserve Congress' inherent power to extend that period.

The conference committee's compromise, "twenty-five years unless otherwise ordered by Congress", was accepted by both houses.[106] On June 4th, 1920 the President signed the act.[107] However, the act as it appeared in the Statutes at Large inexplicably provided for a fifty-year minerals reservation "unless otherwise ordered by Congress".

Two points emerge from this analysis. First, Congress reserved the minerals to the tribe for only twenty-five years. Second, the "unless otherwise ordered" clause was not inserted as a reservation of power to change the period of the minerals reservation; that Congress had that power was never in dispute; rather, it was simply a product of Congressional disagreement over the initial duration of the period.

3. *Respondents' Analysis*[108] *of the Legislative History of the 1926 Act Is Not Sound.*

As discussed in the Brief For Petitioner,[109] the surrounding circumstances and legislative history of the 1926 Act establish, consistent with the terms of the Act and allotment patents, that both Congress and the Northern Cheyenne people intended the 1926 Act to serve two specific functions: all lands and natural resources of the Reservation

106. 59 Cong. Rec. 7845, 7874 (1920).

107. 59 Cong. Rec. 7845, 7874, 8156, 8160, 8620 (1920).

108. This analysis is found at pages 33-35 of Brief For Respondents Williamson and Bowen.

109. Brief For Petitioner at 57-78, 15-20.

were to be confirmed and preserved in tribal ownership to be held and used for the benefit of the Tribe as a whole; and limited allotments were to be made from those tribal lands to enable the development of individual homesteads. Respondents contend, however, that the legislative record contains "strong evidence" of an intent "not to delay *vesting* the minerals."[110]

In point of fact, the legislative record contains no evidence whatsoever stating *explicitly* the rationale for providing for the transfer of minerals fifty-years hence. However, the record does contain an indisputable theme regarding the minerals—they were to be withheld from allotment so that they might be developed for the benefit of all the people. In light of this central theme, the function of the provision calling for a transfer fifty-years hence is readily identified. Believing that fifty-years offered "a means for the development of any mineral resources, such as oil, which may be discovered on the reservation for the benefit of the tribe",[111] Congress undoubtedly proceeded on the basis that it would be sensible to thereafter unify title to both surface and subsurface in the allottee. Accordingly, in 1968, upon realizing that the essential intent regarding tribal mineral wealth was as yet unrealized, Congress provided for the continuance of tribal ownership and control over minerals. Furthermore, being advised by the Department of the Interior that continuing that ownership for a finite period "would create an extremely difficult and costly requirement for determining the heirs",[112] Congress continued tribal ownership in perpetuity.

110. Brief For Respondents Williamson and Bowen at 35 (emphasis in the original).

111. 67 Cong. Rec. 9886 (1926) (remarks of Representative Leavitt).

112. S. Rep. No. 1145, 90th Cong., 2d Sess. 2 (1968).

Respondents seize upon the facts that an early proposed version of the 1926 Act provided that "only the surface" would be allotted and that this phraseology does not appear in the final act.[113] Careful analysis, however, reveals that this change is in no way indicative of an intent to vest rights in the subsurface estate in the allottees. The originally proposed bill provided that only agricultural lands would be listed for allotment, and that prior to allotment those lands would be examined for mineral content by the Geological Survey. If any of those listed lands were found to contain minerals, then only the surface would be allotted and the minerals would remain with the tribe.[114] The Senate Committee on Indian Affairs, however, deleted the provision requiring the Geological Survey to determine the mineral content of lands listed for allotment, and substituted the blanket reservation to the tribe of *all* minerals on the reservation, which appears in the final act.[115] Therefore, respondents' argument that this adjustment in language indicates a Congressional intent "not to delay *vesting* the minerals"[116] is untenable. Moreover, this broadening of the minerals reservation indicates quite the contrary.

4. *Respondents' Non-Indian Authorities*[117] *Are Wholly Irrelevant to the Case at Hand.*

The Brief for Petitioner and this Reply Brief set out that substantial body of federal Indian law decisions of this Court dealing with the power of Congress, in light of the

113. Brief For Respondents Williamson and Bowen at 33-35.

114. H.R. 9558, 69th Cong., 1st Sess. (1926) (Brief For Petitioner at A-11).

115. S. Rep. No. 638, 69th Cong., 1st Sess. 2 (1926) (Brief For Petitioner at A-15).

116. Brief For Respondents Williamson and Bowen at 35 (emphasis in the original).

117. Brief For Respondents Williamson and Bowen at 28-29.

Fifth Amendment, to amend allotment legislation. Without question, this body of decisions establishes that congressional amendment of an executory portion of a statutory allotment plan "takes" no vested property rights. These decisions, without exception, are based on principles arising from the unique legal status of Indian tribes under federal law and the accompanying plenary power of Congress.

Disregarding this Court's 1972 decision, *United States v. Jim*, 409 U.S. 80, respondents seek to avoid the force of this body of federal Indian law decisions by pointing[118] to certain decisions of this Court which are said to mark the decline of what respondents term the "privilege doctrine" in constitutional adjudication. However, these decisions are wholly irrelevant to the instant case for the following reasons.

First, the decisions cited by respondents are intrinsically different from the instant case—they do not involve adjudications within the special historical and legal context of federal Indian law. Thus, for example, while conventional equal protection analysis was performed in *Shapiro v. Thompson*, 394 U.S. 618 (1968), *Graham v. Richardson*, 403 U.S. 344 (1971), *Jimenez v. Weinberger*, 417 U.S. 628 (1974), and *Weinberger v. Wiesenfeld*, — U.S. —, 43 L. Ed.2d 514, 95 S. Ct. 1225 (1975), to strike down invidiously discriminatory statutory classifications based respectively on residence, citizenship, status of birth, and gender, this Court in 1974 denied a claim that it was invidiously discriminatory to establish statutory classifications according preference to Indians in governmental employment, on the following analysis:

> Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and

118. *Id.*

> upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally-recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. . . .

Morton v. Mancari, 417 U.S. 535, 551 (1974).

Moreover, the cases cited by respondents are, in yet another sense, generically different from the case at hand. The issue in the instant case concerns the substantive nature of respondents' rights under the 1926 Northern Cheyenne Allotment Act—specifically, whether they have progressed to the point of being vested property rights within the meaning of the Fifth Amendment, not subject to congressional alteration. Respondents' authorities, however, do not in fact involve inquiries into the substantive nature of rights acquired under legislation—these authorities are in fact wholly unconcerned with the question of whether the involved legislation has given rise to rights which have vested and are therefore immune from subsequent congressional alteration. Rather, the cases cited by respondents deal with entirely different issues of governmental power, to wit: (1) the constitutional validity of the *formulation* of legislation adopted by the government for the dispensation and administration of various benefits and opportunities;[119] (2) the constitutional validity of the *procedures*

119. *Sherbert v. Verner*, 374 U.S. 398 (1963) (legislative provision abridges right to free exercise of religion); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (legislative classification impinges on constitutional right to travel and therefore violates equal protection); *Graham v. Richardson*, 403 U.S. 344 (1971) (statutory classification based on alienage violates equal protection); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (legislative classification based on status of birth violates equal protection); *Weinberger v. Wiesenfeld*, — U.S. —, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975) (legislative classification based on gender violates equal protection).

employed by the government in terminating eligibility for the legislative benefits and opportunities.[120] Thus, while it was reasoned in these cases that the government's obligations to *formulate* and *administer* the involved legislative programs consistent with the constitutional requirements of equal protection, freedom of religion, and procedural due process, could not be avoided on the ground that benefits under the program were mere "privileges",[121] it was decidely *not* held that the benefits to be accorded were vested under the Fifth Amendment and insulated from further congressional action. In fact, the only case cited by respondents dealing with this latter issue, *Flemming v. Nestor*, 363 U.S. 603 (1960), specifically upheld a congressional amendment terminating social security benefits which had been previously available under the Social Security Act.

5. *The Argument*[122] *That Respondents Acquired Vested Rights in the Minerals Under the 1868 Treaty Is Invalid.*

Respondents assert [123] that they acquired vested rights to the minerals beneath their allotments by virtue of the Treaty with the Northern Cheyenne and Northern Arapaho,

120. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits without prior hearing violates procedural due process); *Wheeler v. Montgomery*, 397 U.S. 280 (1970) (termination of welfare benefits without prior hearing violates procedural due process); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (revocation of parole without prior hearing violates procedural due process); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (discharge of federal employee without prior hearing does not violate procedural due process).

121. *Weinberger, supra* at 523-24; *Morrissey, supra* at 481; *Graham, supra* at 374; *Goldberg, supra* at 262; *Sherbert, supra* at 404-06. *But see Arnett, supra* at 151-52.

122. Brief for Tribal Respondents at 3, 6, 7-11, 11-19.

123. *Id.*

May 10, 1868, 15 Stat. 655.[124] This claim is totally devoid of merit—either factual or legal—for the following reasons.

a. No Factual Basis

The reservation lands that were to be set aside under this treaty[125] are *not* the reservation lands involved in the instant case. The treaty contemplated that the Northern Cheyenne and Northern Arapaho were to be settled either on lands contained in the present state of *Oklahoma*[126] or *South Dakota*.[127] However, the Northern Cheyenne did not in fact settle on the lands specified in that treaty. Instead they remained in Montana, defeated Custer at Little Bighorn in 1876, were banished to the Indian Territory in Oklahoma in 1877, and one year later commenced the 1,500-mile trek back to Montana to reclaim their homeland which is now the Northern Cheyenne Reservation.[128] Accordingly, the Northern Cheyenne Reservation rests exclusively on the Executive Orders of November 26, 1884,[129] March 19, 1900,[130] and the 1926 Act.[131]

124. *Id.*, Appendix A.

125. The treaty states that the Northern Cheyenne and Northern Arapaho were to accept either some portion of the reservation created by the Treaty with the Southern Cheyenne and Arapaho, October 28, 1867, 15 Stat. 593, or some portion of the reservation created by the Treaty with the Sioux (Brulé and other Bands) and Arapaho, April 29, 1868, 15 Stat. 635.

126. Treaty with the Southern Cheyenne and Arapaho, October 28, 1867, art. 2, 15 Stat. 593.

127. Treaty with the Sioux (Brulé and other Bands) and Arapaho, April 29, 1868, art. 2, 15 Stat. 635.

128. M. SANDOZ, CHEYENNE AUTUMN (1953).

129. I C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES 860 (1904).

130. *Id.*

131. Moreover, the provision, (art. III), in the 1868 Treaty with the Northern Cheyenne and Northern Arapaho which is asserted by respondents to have created vested rights to minerals, states that the lands "shall cease to be held in common" when "selected, certified, and recorded in the 'Land Book' ". It further provides that each selection shall be evidenced by a "certificate" recorded in the "Land Book". Additionally, the Indian was to have "exclusive possession" only "so long as he or they may continue to cultivate it". The record in this case provides no basis whatsoever for determination of these factual matters.

b. No Legal Basis

Ignoring for a moment the glaring factual difficulties with respondents' treaty theory, the record in this case indicates that *none* of the lands of the Northern Cheyenne Reservation had in fact been allotted at the time of enactment of the 1926 Act.[132] In this circumstance, Congress in 1926 had complete authority to enact allotment mechanisms which would supercede any allotment scheme contemplated in a prior treaty. *Chase, Jr. v. United States*, 256 U.S. 1 (1921); *Nadeau v. Union Pacific R.R.*, 253 U.S. 442 (1920); *United States v. Chase*, 245 U.S. 89 (1917); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899).[133]

6. *The Argument[134] That the 1968 Amendment Subjects Tribal Mineral Development to State Taxation and Therefore Constitutes a "Taking" Is Both Improper and Invalid.*

At the outset, it is imperative to realize that respondents Williamson and Bowen's argument[135] has no proper place in the instant case. The issue before this Court is whether *respondents* were deprived of vested property rights by the 1968 Amendment.[136] This taxation argument, however, is

132. Brief for Petitioner at A-13; Appendix at 47, 49, 50-51, 53-55.

133. Brief for Petitioner at 26-28, 21-22.

134. Brief for Respondents Williamson and Bowen at 46-49.

135. *Id.*

136. The issue before this Court has been specified by Congress as—

> . . . whether under the provisions of the Act of June 3, 1926, as amended, *the allottees, their heirs or devisees,* have received a vested property right in the minerals. . . .

Act of July 24, 1968, 82 Stat. 425. Respondents Williamson and Bowen themselves agree that the "Issues Presented" are:

> (1) Did the Northern Cheyenne Indian *allottees* receive a vested, or constitutionally protected interest in the minerals. . . .
>
> (2) May Congress divest such *individual interest*. . . .

Brief for Respondents Williamson and Bowen at 1-2. *Accord,* Brief for Tribal Respondents at 2-3; Brief for Petitioner at 2-3.

addressed to the vested property rights of *petitioner*—it is argued that the effect of the 1968 Amendment will be to confiscate *tribal* property for the benefit of the state of Montana. Such an argument is patently inappropriate. Moreover—assuming that these *non*-tribal respondents possess standing to assert the property rights of the Tribe—the argument has no legal merit.

Respondents Williamson and Bowen argue that 25 U.S.C. §398c, which authorizes state taxation of—

> . . . improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations. . . .

applies to lessees of *tribal* minerals, but not to lessees of allotted minerals. Respondents conclude that if the perpetuation of tribal ownership were permitted, the result would be an impermissible "taking" of tribal property through state taxation, which, they argue, would not occur if the minerals were to be transferred to the allottees in accordance with the original Congressional plan. This argument, which is supported by the citation of one irrelevant case (*Squire v. Capoeman*, 351 U.S. 1 (1955)), is invalid for a number of reasons.

Before demonstrating this invalidity, it must be noted that this argument—which respondents assert serves to assure that "all the royalties from the coal at issue remain under Indian control for Indian use and benefit"[137]—is in fact being championed by representatives of that portion of the respondent-class consisting exclusively of persons who are *not* members of the Northern Cheyenne Tribe.[138] If

137. Brief for Respondents Williamson and Bowen at 48.

138. This portion of the class consists of approximately 250 persons, including Indians who are not Northern Cheyennes and persons who are white (*See* Brief for Petitioner at 4). As a matter of fact, respondent Bowen is himself a white man.

these non-Northern Cheyenne respondents prevail in this argument, *they* will acquire ownership of a substantial[139] portion of the Northern Cheyenne mineral wealth.

Moreover, respondents' argument is inherently circular. Under their Fifth Amendment premise, §398c could not have applied to tribal mineral development *ab initio*. For, if, as respondents argue, *continuing* to subject the tribal mineral estate to state taxation constitutes a "taking", then the *original* subjection of that estate to taxaion was also a "taking". In 1926, Congress, with the enactment of the Northern Cheyenne Allotment Act, "recognized" tribal title to the Reservation. That recognition endowed the Tribe with a vested property interest in the entire Reservation.[140] In 1927, Congress enacted 25 U.S.C. §398c.[141] Therefore, if respondents' Fifth Amendment premise is sound, then from the outset §398c could not have, consistent with due process, been applicable to the minerals on the Reservation. Accordingly, accepting respondents' premise, the 1968 Amendment will not have the effect of subjecting tribal mineral development to state taxation.

In any event, respondents' taxation argument has no legal merit, for the following reasons.

First, §398c has never been applicable to the Northern Cheyenne Reservation. This provision was enacted as part of the Act of March 3, 1927, 44 Stat. 1347, legislation enact-

139. Approximately 17% of the respondent class is non-Northern Cheyenne. Presumably these non-Northern Cheyenne respondents would acquire some commensurate portion of the mineral wealth of the Tribe if they prevailed in this action.

140. *See generally Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169 (1947); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) (dictum).

141. Act of March 3, 1927, §3, 44 Stat. 1347.

ed because of conflicting opinions as to whether there existed statutory authority for mineral-leasing on purely executive order reservations.[142] This conflict stemmed primarily from the tenuous and uncertain nature of title based only on executive order. The purpose of the 1927 act, then, was to provide clear-cut statutory authority for the leasing of minerals on such reservations.[143] The act was decidedly not addressed to mineral-leasing on reservations which had been "recognized" by Congress. By 1927, there was in fact no need for such authority with respect to the Northern Cheyenne Reservation. Congress had already "recognized" tribal title with the enactment of the Northern Cheyenne Allotment Act of 1926. Moreover, that 1926 Act itself set forth a specific mechanism for leasing of minerals. Accordingly, the 1927 act has never been applicable to the Northern Cheyenne Reservation. Additionally, the case *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159 (1936), *rehearing denied*, 299 U.S. 624 (1937), supports the proposition that the Northern Cheyenne Reservation is not an executive order reservation within the meaning of the Act of March 3, 1927. In that case, this Court held that the Blackfeet Reservation, which like the Northern Cheyenne Reservation rests on a succession of actions by the Executive and Congress, was not an executive order reservation within the meaning of the 1927 act.

Second, assuming *arguendo* that the Act of March 3, 1927 initially applied to the Northern Cheyenne Reservation, it would have been, in any event, superceded by the Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. §§396a-f. This

142. Comment, *Tribal Property Interests In Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627, 632 (1960).

143. *Id.* at 632-37.

comprehensive leasing act was enacted for the purpose of replacing the prior fragmentary legislation pertaining to mineral-leasing on Indian lands.[144] In fact, the Northern Cheyenne Allotment Act states specifically that leasing of minerals is to be governed by this 1938 act. [145]

Finally, the above analyses notwithstanding, and assuming that on some basis the Act of March 3, 1927 is applicable to the Northern Cheyenne Reservation, the following points must nevertheless be made. The 1927 act applies only to leasing—accordingly, the taxation provisions would not apply to development arrangements other than leasing.[146] Moreover, the full text of the 1927 act indicates that its coverage is limited only to oil and gas development.[147] Therefore, respondents' preoccupation with the Montana coal severance tax is not justified.

Additionally, respondents' interpretation that 25 U.S.C. §398c applies to leasing of tribal minerals, but not to leasing of allotted minerals, ignores the broad terms of that provision—state taxation is authorized with respect to "*any lessee* upon *lands* within Executive order Indian reservations." The case, *Squire v. Capoeman*, 351 U.S. 1 (1955), which respondents cite in support of their interpretation is in fact inapposite. First, *Squire* deals with the question of whether a *general* provision of the Internal Revenue Code

144. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 695-98 (2d ed. 1958). Section 7 of the Act of May 11, 1938 contains a general repealer clause. 52 Stat. 348.

145. Act of September 22, 1961, 75 Stat. 586, as amended by the Act of July 24, 1968, 82 Stat. 424 (*See* Brief for Petitioner at A-5-6).

146. Ziontz, *Indian Self-Determination: New Patterns for Mineral Development*, INST. ON INDIAN LAND DEVELOPMENT, ROCKY MT. LAW FDN. 13-1, 13-8 (1976).

147. *See* DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 695 (2d ed. 1958).

was intended to tax proceeds from the sale of timber on allotted lands. Therefore, it is by no means dispositive of the issue at hand, which involves a tax provision dealing *expressly* with Indian lands. Furthermore, it decidedly does not express a rule of interpretation favoring taxation of tribal over allotted interests.

7. *The Argument That "The Tribe's Legislative Authority"[148] Can Adequately Control Any and All Reservation Mineral Development Is at Best Overstated If Not Invalid.*

While not a legal issue in the case at hand, the contention is raised by respondents that tribal authority is "broad enough to adequately regulate *any* coal development within the Reservation."[149] Petitioner indeed agrees that tribal sovereignity and authority are significant doctrines of Indian law. However, contrary to respondents' simplistic if not glib treatment of these doctrines, in actuality the current scope of tribal sovereignty and authority is by no means precisely-defined or well-settled. For example, as recently proclaimed within *United States v. Mazurie*, 419 U.S. 544 (1975), Indian tribes "possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life;"[150] yet this Court in *Mazurie* went on to state that it "need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26 [a tribal liquor ordinance]."[151] With issues as basic as this one still unresolved by this Court, it truly strains credulity for respondents to take the position that tribal sovereignty and authority are a most certain panacea

148. Brief for Respondents Williamson and Bowen at 46.

149. *Id.* at 47 (emphasis in the original).

150. 419 U.S. at 557.

151. *Id.*

in the face of the myriad of problems which would flow from strip-mining on the Reservation.

Moreover, beyond the fact that tribal sovereignty and authority are less than sharply-delineated doctrines, protections — such as due process — afforded individuals, both Indian and non-Indian, under the 1968 Indian Civil Rights Act [152] would raise a whelter of potential issues and litigation in the face of tribal attempts to adequately regulate individuals' coal development within the reservation. Summarily, in light of this tension between tribal powers and the Indian Civil Rights Act, respondents' tribal powers argument is all the further undermined.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

March 23, 1976

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152. 25 U.S.C. §1302 *et seq.* (1970).